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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, Rm 3042
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: WAC 01 258 51569 Office: CALIFORNIA SERVICE CENTER Date: FEB 02 2004

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a firm engineering and manufacturing telecommunications products. It seeks to employ the beneficiary permanently in the United States as an electrical engineer, RF [radio frequency]. As required by statute, the petition (I-140) is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Eligibility in this matter turns, in part, on whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date. The priority date is that on which the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petition's priority date in this instance is March 14, 2001.

Counsel initially submitted insufficient evidence of the education and experience of the beneficiary and of the petitioner's ability to pay the proffered wage at the priority date. Salient to the expressed ground of the decision, the request for evidence (RFE) dated November 20, 2001 required additional evidence of education to establish that the beneficiary holds a United States baccalaureate degree or the foreign equivalent of a baccalaureate degree. The director construed the initial evidence to prove only undergraduate work worth three (3) years of college.

Counsel offered a brief with four (4) points (RFE response), stating in relation to the expressed ground of the decision:

> I hope that I am mistaken, but my understanding from this request is that you are taking the position that only an actual B.S. degree will do for this case, not

any combination of experience plus education.

Counsel's hopes were disappointed. The director discussed the report dated December 10, 1999 from David H. Mihalyi (Mihalyi report), accompanied by a diploma and transcript indicating the completion of three (3) years of study at Liaoning Vocational Higher Institute. The Milhalyi report relied on 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), a regulation affecting non-immigrants, to apply three years of the beneficiary's experience to equal a semester of credit (three-for-one credit), in order to accord him a level of knowledge, competence, and practice comparable to that which he would acquire by attaining a baccalaureate degree in electrical engineering at an accredited university in the United States. The director determined that equivalency under the non-immigrant regulation did not apply to this immigrant petition.

The director, further, weighed the petition as one for a skilled worker, but determined that this particular ETA 750 does not provide for a baccalaureate degree comprised of employment experiences or a combination of education and work experience. The director determined that the beneficiary was not a member of the professional field of the intended employment and denied the petition.

On appeal, the AAO notes that the ETA 750, Part A, in block 14, (the job offer) exacts four (4) years of college education with a B.S. or equivalent in electrical engineering. Also, Part A, block 14 (the job offer) specially requires three (3) years of experience in the job offered or three (3) years of experience in the related occupation of engineering of RF products. Block 15 states that an applicant must have experience with the engineering of RF products.

On appeal, counsel refers, instead, to ETA 750, Part B, items 11 and 14, a statement of qualifications of the beneficiary, and argues:

> At item 11 of part B, it was clearly indicated that [the] beneficiary had a Chinese "diploma" rather that a B.S., and at item 14, it was indicated that his attached proof of qualification included "Educational /Experience evaluation" (copy attached as Exhibit 1). It was therefore plain from the face of the form that in fact the job requirement of B.S. or equivalent was being satisfied by the [beneficiary] by a combination of education and experience.

Counsel's focus is not definitive as to whether a beneficiary is eligible for a third preference immigrant visa. Citizenship and

Immigration Services (CIS), formerly the Service or INS, must ascertain whether the alien is, in fact, qualified for the certified job. CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Counsel contends that the decision disregarded several precedents and that they bind CIS to constitute this beneficiary's experience as education. None claims, however, to override the job offer portion of any ETA 750 for an immigrant petition and substitute a three-for-one credit instead of a four (4) year degree, or the equivalent, of coursework. Counsel vigorously assaults the logic of allowing certain matters of equivalence of experience and education for some petitions, but not others.

The petitioner's ETA 750, Part A, Block 14 has not indicated, in any event, that a combination of education and experience can be accepted as meeting the minimum educational requirements stated on the labor certification. The authorities support reference to the job offer portion of the ETA 750, and none leads to a conclusion to overthrow it without another ETA 750 and petition. Therefore, the combination of education and experience may not be accepted in lieu of education under this I-140.

The evaluation in the record used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. No authority supports the introduction of that rule in these proceedings. The beneficiary was required to have a four (4) year bachelor's degree on the Form ETA 750. The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor. Since that was not done, the director's decision to deny the petition must be affirmed.

Counsel refers to the Board of Alien Labor Certification Appeals (BALCA) decision in *Syscorp International*, 89-INA-212 (April 1, 1991) and suggests that it as a binding precedent. Counsel does not provide its published citation. It is not a decision of the Board of Immigration Appeals, entitled to such an effect, under 8

C.F.R. § 3.1(g). While 8 C.F.R. § 103.3(c) provides that CIS's precedent decisions are binding on all CIS employees in the administration of the Act, counsel does not identify this as one. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The decision and arguments of counsel addressed qualifications of the beneficiary, as stated by the petitioner in Part A, block 14, of the labor certification as of the priority date. The petitioner has not established that the beneficiary had a four (4) year B.S. degree or the equivalent. Therefore, the petitioner has not overcome this portion of the director's decision.

The I-140 claims less than 100 employees, and the AAO cannot presume the petitioner's ability to pay the proffered wage at the priority date. 8 C.F.R. § 204.5(g)(2). The 1999 and 2000 Forms 1120S, U.S. Income Tax Returns for an S Corporation, relate to periods before the priority date. The one for 2000 reports an ordinary loss of ($8,638,705) from trade or business. It shows a deficit ($4,558,982) of current assets minus current liabilities.

The RFE requested evidence of the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence. The petitioner's evidence failed in this regard. For this additional reason, the approval of the petition is unwarranted.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.